No. 83-1286

In the
Supreme Court of the United States
October Term, 1983

DIRECTOR, Illinois Department of Corrections,
Petitioner,

vs.

PAULA GRAY,
Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

James H. Reddy
Assistant Public Defender
403 Daley Center
Chicago, Illinois 60602
(312) 443-6350
Attorney for Respondent.

The Schaffer Press, Inc.—(312) 263-6250

QUESTIONS PRESENTED FOR REVIEW

Whether the Court of Appeals abused its discretion in deciding the merits of Respondent's constitutional claim where the Court had before it (1) the state trial record upon which the claim was solely based; (2) the state appellate court briefs of the parties on the merits of the constitutional claim (including the Petitioner's 82-page brief); (3) the opinion of the state appellate court which specifically rejected the constitutional claim; and (4) the federal district court pleadings and memoranda of law of the parties seeking summary judgment on the constitutional claim.

Whether Respondent exhausted her state remedies where she had previously raised the federal constitutional claim in the state appellate court; where the state appellate court specifically ruled on the merits of the claim; where she then presented the constitutional claim to the state supreme court in a petition for discretionary review; and where she was therefore precluded from seeking state collateral review by state doctrines of waiver and res judicata.

Whether the Court of Appeals correctly decided that Respondent's Sixth Amendment right to conflict-free counsel was violated at her state court trial.

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OCTOBER TERM, 1983

DIRECTOR, Illinois Department of Corrections,

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PAULA GRAY,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

This Court is referred to the statement of facts contained in the Seventh Circuit Court of Appeals opinion in this case. See United States ex rel. Gray v. Director, 721 F.2d 586 (7th Cir. 198 which opinion is reprinted as Appendix A to the Petition for Writ Certiorari.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I.

THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION IN DECIDING THE MERITS OF THE CONSTITUTIONAL CLAIM.

This Court, in Singleton v. Wulff, 428 U.S. 106 (1976), note

> The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule. 428 U.S. at 121.

Clearly, the Court of Appeals did not abuse its discretion in reaching the merits of Respondent's constitutional claim. It is not uncommon for the Court of Appeals to reach the merits of a state habeas petition that it finds improperly dismissed. Cf. Williams v. Kullman, 722 F.2d 1048, 1049 (2nd Cir. 1983). The reason is obvious: remand to the district court for a decision on the merits of a question of constitutional law would inevitably be followed by appeal back to the Court of Appeals by the losing party. At such a second appeal, the Court of Appeals would undertake de novo review of the constitutional question. United States v. Cockrell, 720 F.2d 1423, 1426 (5th Cir. 1983). Obvious considerations of efficiency and finality militated in favor of the Court of Appeals reaching the merits of Respondent's constitutional claim.

Petitioner claims that he was "unheard" in the court below and was unable to brief the merits of the constitutional claim. This is absurd. Petitioner filed an 82-page brief in the state appellate court over 4 years ago arguing that the trial record did not reveal "an actual conflict of interest manifested at trial." (Petitioner's state appellate court brief, 70, 71) The state appellate court ruled in favor of Petitioner and found no "actual conflict," citing this Court's decision in Cuyler v. Sullivan, 446 U.S. 335 (1980). People v. Gray, 87 Ill.App.3d 142, 408 N.E.2d 1150, 1157 (1980). After Respondent was denied discretionary review in the state supreme court (81 Ill.2d 604 [1980]), she sought a writ of certiorari in this Court, arguing that the state appellate court had misapplied Cuyler v. Sullivan. Petitioner opposed certiorari, arguing that Cuyler was properly applied. Certiorari was denied. Gray v. Illinois, 450 U.S. 1032 (1981).

Respondent then sought a writ of habeas corpus in the federal district court. She filed a 7-page petition/memorandum that solely relied on this Court's decisions in Wood v. Georgia, 450 U.S. 261 (1981),

Cuyler v. Sullivan, 446 U.S. 335 (1980), and Holloway v. Arkansas, 435 U.S. 475 (1978). Petitioner answered with a 13-page response. He also filed the 5-volume state trial record and the briefs of the parties in the state appellate court in support of his position that the trial record did not support a Cuyler claim. Noting that "there is no genuine issue as to any material fact," Petitioner sought summary judgment. Respondent agreed that there was no factual dispute but suggested that judgment be entered in her favor.

While the parties awaited a ruling on the merits of the Cuyler claim in the federal district court, this Court issued its opinion in Rose v. Lundy, 455 U.S. 509 (1982). The federal district court then ordered Petitioner to file a memorandum discussing the applicability of Rose v. Lundy to the case. Petitioner told the district court that "the instant petition presents but a single unexhausted claim." He concluded that Rose v. Lundy "has no special applicability to the resolution of the instant petition." (Memorandum filed March 30, 1982.) Yet on September 30, 1982, the district court issued an opinion dismissing the petition on Rose v. Lundy grounds.

Respondent appealed to the Seventh Circuit and attached a copy of the petition/memorandum for habeas corpus as an appendix to the brief. Although Respondent specifically addressed the district court's erroneous dismissal on Rose v. Lundy grounds, the Court of Appeals had before it the 5-volume trial record, the briefs of the parties in the state appellate court, and the pleadings and memoranda filed in the federal district court. In short, the Court of Appeals had before it every case and every argument that Petitioner had made on the Cuyler claim in 4 years of litigating that claim. Yet Petitioner was unheard? Petitioner could not reasonably write any more pages in support of its position on the Cuyler claim than were already before the Court of Appeals.

The Court of Appeals weighed Petitioner's arguments and found them wanting. Petitioner would have been quite willing for the Court of Appeals to reach the merits of the Cuyler claim if that court had ruled in his favor:

> Perhaps it would not have mattered that the Court of Appeals decided an issue . . . if that court had correctly stated and applied the law. (Pet. for Cert., 8)

But long ago Chief Justice Taft made clear that a petitioner's displeasure with the result below is no basis for this Court to exercise its sound discretion in granting the writ of certiorari:

> The jurisdiction [of this Court to review cases by way of certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Magnum v. Coty, 262 U.S. 159, 163 (1923).

Petitioner has injected a few red herrings that should be summarily disposed of. Although Petitioner claims that the Court of Appeals misread Illinois law on coercion/compulsion, this is not true. The Court of Appeals simply quoted the Supreme Court of Illinois which noted (in the unpublished opinion in Williams I) that had Paula Gray "been represented by other counsel, she might well have defended on grounds of coercion and become a witness against Williams." Thus, the Supreme Court of Illinois--in ruling on a co-defendant's case--could not help but see that Paula Gray could not properly be represented by the same attorney who represented Dennis Williams. While it is true that compulsion is not a defense to murder in Illinois, it is a defense to rape and would have been available to Respondent at trial. Moreover, coercion would be extremely relevant on the issue of accountability, another defense ignored by Paula's conflict-laden attorney.

Another red herring is the fact of pending certiorari petitions in Illinois v. Williams and Illinois v. Rainge. The issue in those cases was ineffective assistance of counsel based on incompetence. The issue in Respondent's case was never incompetence of counsel but rather conflict of interest under Cuyler. Whether Williams and Rainge were

affirmed on appeal or not has nothing to do with the issue of conflict of interest, which the Illinois Supreme Court specifically held did not apply to Williams in Williams I.

II.

RESPONDENT HAD EXHAUSTED HER STATE REMEDIES.

Respondent argued in the state appellate court that the trial record demonstrated that Respondent's attorney labored under an actual conflict of interest. The state appellate court specifically ruled on this contention:

> Defendant next contends that her sixth amendment right to conflict-free counsel was violated. She argues that her representation at trial by attorney Weston (who was also counsel for Williams and Rainge), was an unconstitutional conflict of interest since she had initially been a State's witness against Williams and Rainge. We disagree. People v. Gray, 408 N.E.2d at 1156.

Respondent then filed a petition for discretionary review in the state supreme court, specifically arguing that the state appellate decision misapplied Cuyler v. Sullivan; arguing that Respondent had shown an actual conflict manifested in the record of her state trial. The petition was denied. People v. Gray, 81 Ill.2d 604 (1980).

Having raised the Cuyler claim in the state appellate court and state supreme court, Respondent was barred by the doctrine of res judicata from raising this same Cuyler claim in a state collateral attack. This was recognized by the Court of Appeals:

> The District Court recognized that claims which were raised (as was the conflict of interest claim) on direct appeal will not be reviewed in post-conviction proceedings in Illinois unless they are based on matters outside the record.
>
> The District Court recognized that the petition and supporting memorandum do not rely on matters outside the trial record. The memorandum for petitioner asserts that the conflicting interests of Paula and Williams were "plain upon the trial record." 721 F.2d at 598. (24a.)

The Court of Appeals, after reading the state trial record, agreed with Respondent:

> We believe that the actual conflict between Paula and Williams clearly appears on the face of the record. 721 F.2d at 597. (23a)

The Court of Appeals hardly waived the exhaustion requirement, as asserted by Petitioner. Rather, the Court of Appeals quite properly found that Respondent had in fact exhausted her state remedies.

III.

THE COURT OF APPEALS CORRECTLY APPLIED THE LAW OF CUYLER V. SULLIVAN TO THE FACTS OF THE CASE.

Since the reasons why Respondent is entitled to relief have already been well-stated by the Court of Appeals, Respondent will not further burden this Court by repeating them here. Suffice it to say that Petitioner's contentions are fully dealt with and rejected in the opinion of the Court of Appeals. Petitioner's proclivity for misreading that opinion is obvious:

> But the Court of Appeals here found evidence of an actual conflict to be unnecessary, since it voided respondent's conviction outright without remanding for an evidentiary hearing on whether an actual conflict of interest existed. (Pet. for Cert., 20)

Apparently, Petitioner missed the Court's holding:

> We believe that the actual conflict between Paula and Williams clearly appears on the face of the record. (Pet. for Cert., 23a)

CONCLUSION

Because the questions presented in the petition are not raised in the record, because Petitioner has shown no good cause for this Court to grant certiorari, and because the decision below correctly applies the decisions of this Court to the facts of this case, Respondent respectfully requests that the petition be denied.

Respectfully submitted,

JAMES H. REDDY
Assistant Public Defender
403 Daley Center
Chicago, Illinois 60602
(312) 443-6350

Attorney for Petitioner.

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MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Respondent, Paula Gray, who is now being held in an Illinois penitentiary, asks leave to file the attached Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Such leave was granted in the District Court and Appeals Court.

The Respondent's affidavit in support of this motion is attached hereto.

JAMES H. REDDY
Assistant Public Defender
403 Daley Center
Chicago, Illinois 60602
(312) 443-6350

Counsel for Respondent.

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AFFIDAVIT

I, PAULA GRAY, being first duly sworn, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed in forma pauperis, I state that because of my poverty I am unable to pay the costs of said proceeding or give security therefor; and that I believe Petitioner should not be granted a writ of certiorari. I further swear that I am unemployed, having been incarcerated for the last 5 years; that I have received no income in the last 12 months; that I own no cash nor property and have no bank accounts; and that I have no dependents.

I understand that a false statement or answer in this affidavit will subject me to penalties for perjury.

Paula Gray
PAULA GRAY

SUBSCRIBED and SWORN TO
before me this 14th day
of February, A.D. 1984.

Donna R. Brown
NOTARY PUBLIC